United States Department of Labor
Employees' Compensation Appeals Board

TESSIE B. TEBIA, Appellant	)	
and	)	**Docket No. 04-1055**
	)	**Issued: November 1, 2004**
U.S. POSTAL SERVICE, INTERNATIONAL SERVICE CENTER, Chicago, IL, Employer	)	

Appearances:
Tessie B. Tebia, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 11, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' schedule award decisions dated April 28 and December 30, 2003 finding that she had no more than a 14 percent impairment of her right upper extremity and a 5 percent impairment of her left upper extremity. Appellant also timely appealed an August 4, 2003 decision denying appellant's request for a review of the written record as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the Office's decision denying appellant's request for a review of the written record.

ISSUES

The issues are: (1) whether appellant has more than a 14 percent impairment of her right upper extremity and a 5 percent impairment of her left upper extremity for which she received schedule awards; and (2) whether the Branch of Hearings and Review properly denied appellant's request for a review of the written record as untimely.

FACTUAL HISTORY

On April 30, 1998 appellant, then a 46-year-old mail handler, filed an occupational disease claim alleging that on April 15, 1998 she became aware that she had developed pain in both shoulders, arms and wrists as well as tingling and numbness in both hands and fingers and that on April 30, 1998 she related this condition to her repetitive employment duties of "unsleeving" letter trays and culling letters." In a letter dated May 20, 1998, the Office requested additional factual and medical evidence from appellant in support of her claim. By decision dated July 17, 1998, the Office denied appellant's claim finding that she failed to submit the necessary medical evidence establishing a diagnosed condition as a result of her accepted employment factors.

Appellant requested reconsideration of the Office's July 17, 1998 decision on August 25, 1998 and submitted additional evidence. In a report dated August 19, 1998, Dr. Vikram H. Gandhi, a Board-certified orthopedic surgeon, diagnosed bilateral carpal tunnel syndrome and opined that this condition was due to appellant's employment duties. By decision dated November 30, 1998, the Office accepted appellant's claim for bilateral carpal tunnel syndrome. The Office later expanded appellant's claim to include right thumb and left index and ring finger tenosynovitis.

Dr. Gandhi performed a left carpal tunnel release on January 5, 2001 and a right carpal tunnel release on April 19, 2001. He recommended a surgical release of the right middle trigger finger due to flexor tenosynovitis on March 26 and May 3, 2001. On May 10, 2001 Dr. Gandhi completed a form report indicating that appellant's right middle trigger finger was related to her employment through repetitive activities. He noted that she was experiencing locking and triggering of the right middle finger. On May 22, 2001 Dr. Gandhi performed the surgical release of the right middle trigger finger.

Appellant returned to light duty on June 20, 2001. In a note dated September 13, 2001, Dr. Gandhi stated that appellant had reached maximum medical improvement. Appellant requested a schedule award on September 17, 2001. In response to the Office's September 24, 2001 request for a permanent impairment rating, Dr. Gandhi completed a report on October 11, 2001 and stated that appellant had developed additional employment-related symptoms. In a letter dated December 16, 2001, appellant asked that the Office hold her request for a schedule award in abeyance until her condition had stabilized.

By decision dated November 19, 2001, the Office found that appellant's actual earnings as a mail handler represented her wage-earning capacity and reduced her compensation benefits to zero based on her earnings in this position.

Dr. Gandhi completed a report on October 14, 2002 finding that appellant had reached maximum medical improvement. He provided his findings on physical examination including intermittent clicking and locking of the thumbs in the flexor sheath due to tenosynovitis, weakness of the hand and stiffness of the neck. Dr. Gandhi listed appellant's range of motion of her neck as 40 degrees and noted that she had muscle spasms. He found decreased grip strength in both hands of 55 percent as well as pain and discomfort. Dr. Gandhi also found swelling at the bases of the thumbs in the flexor sheath with occasional locking. He applied the American

Medical Association, *Guides to the Evaluation of Permanent Impairment*[1] and concluded that appellant's loss of grip strength was a 55 percent impairment of each hand or 20 percent of each upper extremity. He also found that the bilateral thumb clicking was 20 percent impairment of each thumb or 8 percent impairment of each hand. Dr. Gandhi determined that appellant's decreased extension of the cervical spine was a four percent impairment of the whole person. He totaled his impairment ratings to reach 16.8 percent impairment of the whole person.

Appellant requested a schedule award on October 28, 2002. In a letter dated November 12, 2002, the Office requested additional information from Dr. Gandhi regarding appellant's impairment rating in accordance with the A.M.A., *Guides*. Dr. Gandhi completed the Office's form report regarding appellant's permanent impairment on November 18, 2002. In a narrative report dated December 5, 2002, Dr. Gandhi accorded appellant 25 percent impairment of the right hand due to motor loss or 2.5 percent of the upper extremity. He also found 35 percent impairment of the right hand due to sensory impairment, a 13.7 percent impairment of the upper extremity for a total right upper extremity impairment of 16.2 percent. Regarding appellant's left upper extremity, Dr. Gandhi found a 2 percent impairment due to motor loss and 19.5 percent loss due to sensory deficit for a total left upper extremity loss of 21.5 percent. He stated that appellant's loss of sensation, dysesthesias and loss of strength related to median nerve impairment.

The Office medical adviser reviewed the medical evidence on March 21, 2003 and noted that appellant's carpal tunnel incisions were well healed with no scar tenderness or pillar pain. In utilizing the A.M.A., *Guides*, the Office medical adviser found that occasional locking of the right thumb was a 20 percent impairment of that scheduled member and equivalent to a 7 percent impairment of the right upper extremity. He then awarded a seven percent impairment of the right upper extremity due to loss of grip strength and a five percent impairment of the left upper extremity due to loss of grip strength. He stated, "No PPI [permanent partial impairment] is given for sensory deficits as there was no documentation using Semmes-Weinstein monofilaments or two-point discrimination." The Office medical adviser combined appellant's right upper extremity impairments to reach 14 percent and concluded that appellant had only a 5 percent impairment of her left upper extremity.

By decision dated April 28, 2003, the Office granted appellant schedule awards for 14 percent impairment of her right upper extremity and 5 percent impairment of her left upper extremity to run for 59.28 weeks from October 10, 2002 to November 28, 2003.

In a letter dated June12, 2003 and postmarked June 23, 2003, appellant requested a review of the written record from the Branch of Hearings and Review. By decision dated August 4, 2003, the Branch of Hearings and Review denied her request as untimely. The Branch of Hearings and Review further denied the request finding that the issue could be resolved through the reconsideration process.

Appellant requested reconsideration on September 23, 2003 and submitted a report from Dr. Gandhi dated September 4, 2003. In this report, Dr. Gandhi reported appellant's current findings of symptoms in the radial styloid area and across the wrist. He found a suggestion of

[1] A.M.A., *Guides* (5th ed. 2001).

de Quervain's tenosynovitis in the left wrist. Dr. Gandhi also described weakness of the dorsiflexor and loss of grip strength. He stated that appellant had intermittent numbness of the index finger and symptoms of pain and muscle spasms in the left side of her neck. Dr. Gandhi stated that appellant's weakness and lack of sensation were persistent.

The Office medical adviser reviewed this report on October 24, 2003 and stated that as de Quervain's tenosynovitis was not an accepted condition, appellant was not entitled to a schedule award for this condition. He reviewed the statement that appellant had weakness of her dorsiflexors and loss of grip strength as well as intermittent numbness of the index finger. The Office medical adviser noted that Dr. Gandhi did not provide two-point discrimination test results and stated, "It should be noted that in compression neuropathies additional impairment cannot be given for decreased motion." He concluded that the evidence was not sufficient to alter appellant's impairment rating.[2]

By decision dated December 30, 2003, the Office found that the evidence submitted was not sufficient to warrant modification of the April 28, 2003 schedule award decision.[3]

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulation[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[6]

In evaluating carpal tunnel syndrome, the A.M.A., *Guides* provide that, if after an optimal recovery time following surgical decompression, an individual continues to complain of pain, paraesthesias or difficulties in performing certain activities three possible scenarios can be present. The first situation is: "Positive clinical finding of median nerve dysfunction and electrical conduction delay(s): The impairment due to residual CTS [carpal tunnel syndrome] is

[2] In a report dated November 17, 2003, Dr. Gandhi diagnosed herniated cervical discs and opined that these conditions were related to appellant's employment. The Office has not issued a final decision regarding the additional employment injuries alleged, and the Board is precluded from addressing this issue for the first time on appeal. 20 C.F.R. § 501.2(c).

[3] Following the Office's December 30, 2003 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id*.

rated according to the sensory and/or motor deficits as described earlier."[7] In this situation, the impairment due to residual carpal tunnel syndrome is evaluated by multiplying the grade of severity of the sensory or motor deficit by the respective maximum upper extremity impairment value resulting from sensory or motor deficits of each nerve structure involved. When both sensory and motor functions are involved the impairment values derived for each are combined.[8] In the second scenario: "Normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal EMG testing of the thenar muscles: a residual CTS [carpal tunnel syndrome] is still present, and an impairment rating not to exceed 5 percent of the upper extremity may be justified." In the final situation: "Normal sensibility (two-point discrimination and Semmes-Weinstein monofilament testing), opposition strength, and nerve conduction studies: there is no objective basis for an impairment rating."[9]

To accurately evaluate sensory impairment clinically and reduce the subjective nature of these findings,[10] the A.M.A., *Guides* recommend either the two-point test for fine discrimination, the monofilament touch-pressure threshold test or the pinprick test.[11]

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from appellant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[12] However, carpal tunnel syndrome is an entrapment/compression of the median nerve.[13] In compression neuropathies, additional impairment values are not given for decreased grip strength.[14]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for bilateral carpal tunnel syndrome as well as right thumb and left index and ring finger tenosynovitis. Appellant's attending physician, Dr. Gandhi, a Board-certified orthopedic surgeon, performed a left carpal tunnel release on January 5, 2001 and a right carpal tunnel release on April 19, 2001. He also performed a

[7] A.M.A., *Guides* 495.

[8] *Id.* at 494, 481.

[9] *Id*. at 495.

[10] *Id*. at 446.

[11] *Id*. at 445.

[12] *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

[13] A.M.A., *Guides* 492.

[14] *Id*. at 494; *Robert V. Disalvatore*, 54 ECAB ___ (Docket No. 02-2256, issued January 17, 2003).

surgical release of the right middle trigger finger. Dr. Gandhi opined that appellant reached maximum medical improvement on October 14, 2002. He completed a report on December 5, 2002 finding that appellant had 25 percent impairment of the right hand due to motor loss or 2.5 percent of the upper extremity. He also found 35 percent impairment of the right hand due to sensory impairment, a 13.7 percent impairment of the upper extremity for a total right upper extremity impairment of 16.2 percent. Regarding appellant's left upper extremity, Dr. Gandhi found 2 percent impairment due to motor loss and 19.5 percent loss due to sensory deficit for a total left upper extremity loss of 21.5 percent. He stated that appellant's loss of sensation, dysesthesias and loss of strength were related to median nerve impairment. Dr. Gandhi did not provide any physical findings or electrical testing results in support of his impairment ratings. The Office medical adviser discounted these impairment ratings for sensory impairment as Dr. Gandhi did not provide his findings relating to either two-point discrimination or monofilament testing.

Dr. Gandhi's December 5, 2002 report did not provide sufficiently detailed findings to support his impairment ratings due to sensory and motor deficits. Dr. Gandhi did not provide any physical findings in support of his impairment rating. He did not provide the results of testing through either two-point discrimination, monofilament testing or pin prick and did not provide current electrodiagnostic studies establishing continuing electrical conduction delay following the required optimal recovery time after surgery. The A.M.A., *Guides* specifically require both positive clinical findings of medical nerve dysfunction and electrical conduction delays, prior to evaluating an impairment due to carpal tunnel syndrome. Furthermore, Dr. Gandhi did not explain whether appellant's loss of sensibility interfered with activity in any way, such that an examiner could relate this finding with the appropriate table of the A.M.A., *Guides*. Regarding appellant's motor loss due to her accepted conditions, Dr. Gandhi also failed to describe the degree of resistance through which appellant could maintain full range of motion. As this report does not comply with the A.M.A., *Guides* requirements for evaluating permanent impairment due to residuals of carpal tunnel syndrome and does not contain sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations, the Board finds that it is not sufficient to establish the impairment ratings contained therein.

In a report dated October 14, 2002, Dr. Gandhi found intermittent clicking and locking of the thumbs in the flexor sheath due to tenosynovitis as well as swelling at the bases of the thumbs in the flexor sheath with occasional locking. He also found that the bilateral thumb clicking was 20 percent impairment of each thumb or 8 percent impairment of each hand. The Office medical adviser found that occasional locking of the right thumb was a 20 percent impairment of that scheduled member,[15] 8 percent of the hand[16] and equivalent to a 7 percent impairment of the right upper extremity.[17] Dr. Gandhi supported seven percent of the left upper extremity as well due to the identical conditions of appellant's thumbs. It is well established that in evaluating loss of use of a schedule member due to employment injury, the total amount of the

[15] A.M.A., *Guides* 507, Table 16-29.

[16] *Id*. at 438, Table 16-1.

[17] *Id*. 439, Table 16-2.

permanent impairment of the scheduled member should be determined.[18] The Office's procedures require that any previous impairment to the member under consideration be included in calculating the schedule award.[19] As noted by Larson, this is "sometimes expressed by saying that the employer takes the employee as he finds him."[20] The record supports that appellant may also be entitled to a seven percent impairment of her left upper extremity due to the condition of her left thumb preexisting the calculation of the impairment rating. The Board notes that the medical evidence of record appears to support that appellant has a seven percent impairment of each of her upper extremities due to thumb tenosynovitis.

Dr. Gandhi provided findings relating to appellant's neck. He listed appellant's range of motion of her neck as 40 degrees and noted that she had muscle spasms. Dr. Gandhi determined that appellant's decreased extension of the cervical spine was a four percent impairment of the whole person. A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulation. As neither the Act nor the regulation provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award.[21]

Dr. Gandhi found decreased grip strength in both hands of 55 percent as well as pain and discomfort. He concluded that appellant's loss of grip strength was a 55 percent impairment of each hand or a 20 percent of each upper extremity. The Office medical adviser awarded a seven percent impairment of the right upper extremity due to loss of grip strength and a five percent impairment of the left upper extremity due to loss of grip strength. As noted above, the A.M.A., *Guides* specifically exclude grip strength evaluation as a method of determining loss of strength due to carpal tunnel syndrome. Therefore, the Board finds that the Office improperly granted appellant a schedule award based on this method of impairment rating.

Proceedings before the Office are not adversarial in nature and the Office is not a disinterested arbiter; in a case where the Office "proceeds to develop the evidence and to procure medical evidence, it must do so in a fair and impartial manner."[22] In this case, the Office referred appellant's medical evidence to the Office medical adviser to determine the extent of her permanent impairment due to her bilateral carpal tunnel syndrome and other accepted conditions. The Office medical adviser improperly applied the grip strength provision of the A.M.A., *Guides* in determining appellant's permanent impairment for schedule award purposes. On remand, the

[18] *Mike E. Reid*, 51 ECAB 543, 547 (2000).

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.7(2) (March 1995).

[20] Larson, *The Law of Workers' Compensation* §§ 9.02, 87.02 (2000). "Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from latent prior condition … the entire disability is compensable, and … no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death." Larson, § 90.04.

[21] *George E. Williams*, 44 ECAB 530, 533 (1993).

[22] *Walter A. Fundinger, Jr.*,37 ECAB 200, 204 (1985).

Office should refer appellant to an appropriate physician for a physical evaluation and detailed findings in accordance with the A.M.A., *Guides* and should authorize the necessary electrodiagnostic testing to determine the extent of her permanent impairment due to her accepted bilateral carpal tunnel syndrome. After this and such other development as the Office deems necessary the Office should issue a *de novo* decision with regard to the percentage of impairment to the right upper and left upper extremities.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Federal Employees' Compensation Act,[23] concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[24]

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days.[25] Even where the request is not timely filed, the Office may within its discretion, grant a hearing or review of the written record and must exercise this discretion.[26]

ANALYSIS -- ISSUE 2

In the instant case, the Office properly determined that appellant's June 12, 2003 request for a review of the written record postmarked June 23, 2003 was not timely filed as it was made more than 30 days after the issuance of the Office's April 28, 2003 decision. The Office therefore, properly denied appellant's request for a review of the written record as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a review of the written record in this case. The Office determined that a review of the written record was not necessary as the issue in the case could be resolved through the submission of evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a review of the written record as untimely and properly exercised its discretion in determining to deny appellant's request for a review of the written record as she pursues reconsideration and submits new and additional evidence.

[23] 5 U.S.C. §§ 8101-8193.

[24] 5 U.S.C. § 8124(b)(1).

[25] 20 C.F.R. § 10.616. *Tammy J. Kenow*, 44 ECAB 619 (1993).

[26] *Id.*

CONCLUSION

The Board finds that the case requires additional development of the medical evidence to determine appellant's permanent impairment due to her accepted bilateral carpal tunnel syndrome and any other preexisting conditions of her upper extremities. The Board further finds that the Branch of Hearings and Review properly denied appellant's request for a review of the written record as untimely.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated December 30 and April 28, 2003 are remanded for further development consistent with this decision of the Board. The Office's August 4, 2003 decision is affirmed.

Issued: November 1, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member